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FEDERAL COMMUNICATIONS COMMISSION
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**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| | ) | |
| Review of the Commission's Regulations Governing Television Broadcasting | ) | MM Docket No. 91-221 |
| | ) | |
| | ) | |
| Television Satellite Stations Review of Policy and Rules | ) | MM Docket No. 87-8 |

# Further Notice of Proposed Rule Making

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Comments

of

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## Summary

The Media Institute agrees with the Commission's conclusions of more than 10 years ago that its multiple ownership rules are structural barriers to the working of the free market, do not serve the public interest, and are unfaithful to First Amendment values. The Institute believes that the Commission's historical practice of periodically liberalizing the ceilings on numbers of stations that may be group-amassed and that restrains common ownership of overlapping stations is now pointless, counterproductive, and a relic of a compulsive urge to micromanage.

The Media Institute would eliminate as outdated all of the multiple and duopoly ownership rules. The one-to-a-market rule, in the view of The Institute, is no longer credible, has been undercut by a wave of exceptions and waivers. As for Local Marketing Agreements (LMAs), the Commission has admitted that it knows little about such agreements in television, but taints the process by proposing to regulate anyway. The Media Institute labels as "busywork" the Commission's proposal to apply to television LMAs the rules it has adopted for such radio agreements.

The Institute offers, in place of such extensive regulation, the proposition that the public interest is not at significant risk because the process of station acquisition, merger, or other agreement is subject to the application and consent requirement, and that the Commission will continue to be free to interpose where excess threatens. In another view, what The Media Institute proposes is that the Commission think not in terms of regulating and then monitoring to see whether regulation is necessary. The course that The Institute would have the Commission follow would permit the market to operate freely and without government restraint *until* there is a monitoring record to support government action.

**The Case for Eliminating Structural Ownership Rules**

1. On a finding that group owners do a better job of responding to community needs, the Commission concluded more than 10 years ago that its multiple ownership rules are structural barriers to the working of the free market, do not serve "the public interest," and are unfaithful "to First Amendment values" (*Report and Order in Gen. Docket No. 83-1009,* 100 FCC 2d 17, 35 (1984)).

2. The Media Institute, a nonprofit research foundation that is dedicated to protecting the First Amendment and free speech generally, is in full agreement with those conclusions of the Commission that its regulations that have curbed the growth of group ownership of broadcast stations are counterproductive and of dubious constitutional validity. In extensive Joint Comments, dated Nov. 21, 1991, in response to the *Notice of Inquiry* earlier in this proceeding, the Institute urged on the Commission a virtual withdrawal from the structural regulation of the industry.

3. Other agencies of government have also joined what is becoming a consensus in favor of significant rule changes. In *Gen. Docket No. 83-1009,* referred to above, where in 1984 the group ownership rules were scheduled to terminate completely in six years (sunsetting feature later withdrawn on reconsideration, 100 FCC 2d 74 (1985)), the Commission was said to have relied "heavily" on the Department of Justice (Dissent of Commissioner Dawson). The Department had offered written Comments to demonstrate

that the broadcast industry is relatively unconcentrated and that the Commission's group ownership limitations are suspect. The National Telecommunications and Information Administration is similarly in favor of regulatory disengagement. Thus: "...the concerns about undue economic concentration and diversity ... have lessened substantially" (Comments, i, dated Aug. 24, 1992, in MM Docket No. 91-221); "... the Commission [should] eliminate the [national multiple ownership] rule completely" (*Id.*); "... most of the Commission's current rules are not only unnecessary, they are counterproductive" (*Id.* at 3).

4. Over the past decade, then, the federal agencies most intimately tuned to the issue have favored elimination of a national multiple ownership limit. And that includes the FCC which, in 1984 as indicated, voted to liberalize the rule and to close it out -- to eliminate it completely -- within six years. With all of that, The Media Institute suspects that the Commission will ultimately hang on to the reins, although some slack may be expected. That sense of how the issue will play out derives from a perception that the Commission is understandably reluctant to surrender an area of regulation that "... has been a constant feature of the Commission's Rules for decades" (*Further Notice*, ¶2). It is likely, too, that small concessions to the so-called "public interest groups" (*Further Notice*, ¶5), will be factored in as safely and politically correct.

5. The Media Institute is dismayed by that prospect and is hopeful that other circumstances may intervene to avoid such a result. The case for eliminating the national multiple ownership limit does seem overwhelming. And the Institute believes that an alternate approach is available that will relieve all of the Commission's balancing concerns while allowing it to get out of the way. That other route will be explored hereinafter.

6. Finally, in this introduction to The Media Institute's Comments, these observations are in order: Some 73 pages and appendices are given over in the subject *Further Notice* to an extended recitation of the FCC's history of ownership control and to a leaden and bookish repetition of the dynamics of media competition. The review is clearly dutiful, but relevant only to making the case for the proposition that continuing government manipulation has been something less than the route to quality and diverse broadcast programming. In fact, the references in ¶¶70 *et seq.* to the circumstance that cable TV and newspapers, while "not subject to public interest obligations to the same extent as are broadcast stations," nevertheless "cover local issues, endorse local candidates and provide a platform for the presentation of local opinion," should be clue enough that a persistent government presence oppresses the journalistic impulse.

**National Ownership Rule**
**Is Outdated**

7. The limits on number of stations owned and percentage of audience reach achieved, if there ever were any credible point to the concept, are now just regulatory debris. The rule is not only not consistent with its target but is in fact counterproductive. The Media Institute, in its Joint Comments dated Nov. 21, 1991 in response to the *Notice of Inquiry* in this proceeding, has sufficiently documented why these limits are no longer defensible.

8. The Commission itself, more than 10 years ago, declared in *Report and Order in Gen. Docket No. 83-1009,* 100 FCC 2d 17, 35 (1984) that:

> The record assembled by the Commission supports the conclusion that our fundamental concern for a well-informed citizenry is better served by removing rather than retaining government barriers to group ownership of broadcast stations.

And later, at 38, the Commission:

> ... concludes that the public interest, insofar as it relates to encouraging a diversity of viewpoints, would be well served by eliminating the restriction on the number of stations that a single entity may own nationwide.

The Commission then voted to eliminate the limits completely within six years, but as a transitional matter maintained a liberalized cap of 12 stations (*Id.* at 56).

9. Subsequently, on reconsideration, the Commission rescinded the automatic rule expiration date, *Memo. Opinion and Order in Gen. Docket No.*

*83-1009*, 100 FCC 2d 74, 98 (1985). But, in the course of closing in on that modifying its year-earlier condemnation of the rule, the Commission observed, at 88, that:

> ... we reaffirm the conclusions contained in our *Report and Order* that ... elimination of the rule will have no adverse impact on viewpoint diversity or economic concentration.

And, repetitively, at 88:

> ... we continue to support the underlying conclusions contained in the *Report and Order*.

And again at 97:

> On reconsideration, we affirm the conclusion contained in the *Report and Order* that, as a policy matter, the total elimination of a presumptive national ownership rule would benefit the public interest.

10. The search for an explanation of the preference for gradual elimination and of the reversal on "total elimination" arguably comes down to (1) the Commission's responding to the congressional enactment of a moratorium on the implementation of sunsetting (Second Supplemental Appropriations Act, Pub. L. No. 98-396, ¶304, 98 Stat. 1369, 1423 (1984)), and (2) to the natural inclination of regulators to not easily yield control.

11. Now, some ten years later, the Commission, even though the congressional mood seems to favor the principle of government disengagement, is clearly giving signs that it probably will again ease the restrictions but that it will, like its predecessors, give ground grudgingly.

Thus, the subject *Further Notice* at ¶100 alerts that on reconsideration of the 1984 Report and Order:

> ... we reaffirmed the numerical station limit, adopted the 25 percent reach limit, and eliminated the automatic sunset, recognizing that a complete and abrupt elimination of our national multiple ownership rules might engender a precipitous and potentially disruptive restructuring of the broadcast industry.

And, as seemingly direct warning, ¶100 goes on to declare that:

> We continue to believe that changes in the multiple ownership rules should be incremental in order to avoid significant dislocation in the television industry.

The inference to be drawn from that tactical language is that the Commission will continue in effect rules that alter the course of the free marketplace, even though those rules have proved to be, and have been declared to be, counterproductive. And the excuse for that kind of awkward result will be the stale "to avoid significant dislocation," a kind of civilized cover for explaining why the need to interfere with progress is compelling.

12. There is, however, available a more credible alternative way out of the dilemma, and the Commission itself comes close in the *Further Notice*, at ¶101, to identifying the solution. Instead of merely raising the ownership limits and thereafter standing aside to "... monitor ... and determine whether or not problems have arisen....," The Media Institute urges that the same result can be achieved, but with more probity, by eliminating the rule immediately, accompanied by the same proviso that would preserve the

monitoring function. Since every station acquisition requires an application and demands the Commission's consent, the business of maintaining watchfulness would be meaningful and more than gesture. And the low-risk scrapping of an outdated rule would tally with the national mood that now favors less government.

**Local Ownership, or Duopoly, Rule Is Inefficient**

13. Because the rationale for the government's interest in controlling duopoly has, as is the case for national ownership limits, largely evaporated, continued application of current rules is clearly inconsistent with the First Amendment. The Media Institute has at length, in its Joint Comments of Nov. 21, 1991 in response to the *Notice of Inquiry*, offered extended argument for that proposition.

14. The Commission has itself cast doubt on whether there is enough of a problem to support a government interest sufficient to justify the rule that collides with the First Amendment. Thus, in the *Notice of Proposed Rulemaking*, in this proceeding, at 7 FCC Rcd 4111, 4115 (1992), the Commission observed that:

> ... allowing ownership of more than one station in a market (or region) would permit beneficial merger of administrative, newsgathering, and production functions [fn. omitted]. Offering a wider audience to advertisers and sharing joint and common costs, regional groups of stations under common ownership could also compete more effectively.... Finally, we note

> that the level of competition in local markets has greatly increased since the duopoly rule was adopted in 1964....

15. Putting aside doubt as to constitutionality, it is the view of The Media Institute that the Commission appears likely to continue its practice of trying to outguess the free market. As with national ownership limits, the Institute believes that the Commission is about to liberalize its current rules and to overlook a more suitable alternative. Simply, the Commission seems intent on going a small distance, by accepting Grade B contour overlap but clinging to a rule against Grade A overlap. Thus, the subject *Further Notice*, ¶116, clearly states where the inquiry is going:

> The current rule prohibits common ownership of broadcast television stations with overlapping Grade B contours. [fn. omitted.] ...we believe that the record already established is sufficient to justify proposing to relax the rule by decreasing its prohibited contour overlap from Grade B to Grade A.

16. It is the sense of The Media Institute that the Commission is, without provable cause, again tilting toward a wasteful perpetuation of an agony. The duopoly rule probably dates back to 1938; the current version was adopted in 1964 (Subject *Further Notice*, ¶4). But today's video marketplace is remarkably different from the 1964 version. CBS, Inc., for example, found in 1992 (in Comments in response to the *Notice of Proposed Rulemaking* in the subject proceeding) that 52 markets, comprising more than 60 percent of all television households, had available 10 or more local television stations. The

Commission's own Office of Plans and Policy in F. Seltzer and J. Levy, *Broadcast Television in a Multichannel Marketplace,* Working Paper No. 26, 6 FCC Rcd 3996 (1991), described "vast changes in the television marketplace," p. 1, changes that prominently included cable television's reach and increasing subscriber saturation (*Id.* at 67 *et seq.*). The inevitable inference to be drawn from this enormous abundance of video offerings is that the program diversity and economic competition rationales for the Commission's rule that restrains duopoly are no longer valid. With respect to radio, the Commission is on record as having found that its existing rules on duopoly may actually hamper competition by denying stations the right to achieve cost savings through consolidating facilities (*Revision of Radio Rules and Policies,* 9 FCC Rcd 7183 (1994)). That discovery seems just as certainly applicable to television.

17. The Media Institute believes further that the proposal to substitute Grade A for Grade B overlap serves neither the public nor the Commission's interest. Because the intent of the concept is to measure the overlap between core markets of stations proposed for common ownership, the business of relying on contours overlooks more realistic standards. In the real world, the fact that a proposed combination is of stations from two separate and distinct markets would seem to override any consideration of contour overlap. That makes more sense than relying on contour demonstrations that often turn on terrain, antenna height, and power characteristics, and that are at best only theoretical assurances of viewability.

18. The Commission's interest would for additional reason be served by turning away from measuring contour overlap or from any rule of general circumscription. The variables are such in appraising the significance of overlap that, in order to avoid the prospect of a rule riddled and diminished by waivers, we urge the Commission to rely instead on the application and consent process to guard against excesses. This recommendation is consistent with the Institute's suggestion for dealing with national ownership questions -- it avoids the discrediting of rules that are repeatedly waived; it poses insignificant risk to the public interest; and it is in touch with the national mood that favors less government involvement.

**One-to-a-Market Rule**
**No Longer Reputable**

19. The rule that prohibits common ownership of radio and television stations in the same market was originally viewed by the Commission as an extension of its duopoly rule (*Amendment of Sections 73.35, 73.240, and 73.636*, 22 FCC 306, 310 (1970), *on recon.*, 29 FCC 2d 662 (1971)). As such, the rule is now subject to the same infirmities that attend the duopoly rule. Simply, the number of programming outlets has increased dramatically, since 1964 when the duopoly rule for television was instituted, and since 1970 when the cross-ownership rule was adopted. And the original justifications for the rule -- to promote diversity of programming and to nourish competition in local markets -- have been amply satisfied by the workings of the marketplace.

20. There is additional point to abandoning the rule. There are currently in place so many AM-FM-TV combinations that it likely would come as a surprise to those who follow this process only casually that there is in fact a rule against that kind of common ownership. Bluntly, the rule has been scuttled by waivers, and to insist that it has general applicability merely engenders disrespect for the administrative process. So much better, in the view of The Media Institute, would be a reliance by the Commission on the application for consent requirement, a process that in any case is unavoidable. Abandoning the rule would create opportunities for convergences that might deliver public benefit, while the application-for-consent process would reserve to the Commission the occasion to decline proposals that are deemed threatening.

**Commission's Proposal**
**To Regulate LMAs**
**Is Distrustful of Free Market Concept**

21. A Local Marketing Agreement (LMA) is a type of joint venture that generally involves the sale by a station licensee of discrete blocks of time to a broker who then supplies the programming to fill that time and sells the commercial spots to support it (*Further Notice,* ¶133). Such agreements enable separately owned stations to function competitively via joint advertising, shared technical facilities, and joint programming arrangements (*Id*). Just the name of the arrangement and the description by the Commission of a Local Marketing Agreement as allowing "separately owned stations to function cooperatively via joint advertising, shared technical

facilities, and joint programming arrangements" should sufficiently condemn the FCC's proposal to intervene as an acknowledgment of government's compulsive urge to micromanage.

22. The correctness of that observation is fortified by the language of the *Further Notice.* In ¶136, the Commission admits that it knows little about LMAs in television and that "it may be necessary for the Commission to conduct a survey...." That handicap -- that lack of information about television LMAs and generally about marketing telecommunications services -- seems without significance in the rush to regulate. Thus, *Further Notice,* ¶138:

> We tentatively propose to treat LMAs involving television stations in the same manner as we did for radio stations.

With respect to radio, a licensee's time brokerage of any other radio station in the same market for more than 15 percent of the brokered station's weekly broadcast hours will result in counting the brokered station toward the brokering licensee's national and local ownership limits (47 C.F.R. Section 73.3555(a)(2)(i)). Apart from subjecting television LMAs to such questions as what a "market" is (suburbs, hyphenated markets, etc.) and how to compute "weekly broadcast hours," the Commission has now inadvertently tipped its hand as committed to retaining some limits on national ownership limits, a matter that for more than 10 years it has been saying is unnecessary. See ¶¶7, *et seq.*, above in these Comments.

23. Having adopted rules applicable to radio Local Marketing Agreements, and having declared for the same treatment for television stations, the Commission seems irreversibly on course to adopt rules to regulate such agreements in television. But against a background of the Commission's having no available information about the practice, it seems to The Media Institute to be an example of misdirected government activity that may end up being little more than busywork.

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